In the Supreme Court of the United States.

OCTOBER TERM, 1921.

FRED LEACH, APPELLANT,
v.
WILLIAM B. CARLISLE, POSTMASTER. } No. 105.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE RESPONDENT.

STATEMENT.

To the end that this court may thoroughly grasp the case here before it on appeal, we proceed, prior to a discussion of the points involved, to review the early history of the case. The business career of appellant is thus summed up by the solicitor of the Post Office Department in his findings in an earlier case against Leach (R. p. 60):

> Fred A. Leach, the promoter of this scheme, has been in the mail-order business for from 15 to 20 years. The evidence shows that he was manager of the Distributors Guarantee Association, against which a fraud order was issued May 8, 1908; that he sold vacuum

developers for the enlargement of the male organ under the name of the Vacuum System and David Kuno, Chicago, Illinois; that he also operated under the name of the Austin System and E. D. Austin, Chicago, handling vacuum developers, and that in 1912 and 1913 he sold vacuum developers under the name of Martin W. Wade and Wade Manufacturing Company, Chicago, Illinois.

In 1917 and 1918 appellant operated under the name of Packers Product Company, selling to the public the same remedy involved in the case at bar. He was cited to show cause why a fraud order should not be issued against him. A full hearing was had, and as a result thereof the Postmaster General issued his order on April 4, 1918, instructing the postmaster at Chicago, Illinois, in substance, to refrain from delivering mail and paying postal money orders to Leach's company. (R. p. 61.) Appellant thereupon sought an injunction to restrain the said postmaster from carrying out the Postmaster General's order. A motion to dismiss the bill of complaint was granted by United States Circuit Judge Baker, who wrote a memorandum opinion upholding the Postmaster General's finding of fraud. (R. p. 22 and 25.) Appellant acquiesced in the judgment, and changed the name of his company from the Packers Product Company to Organo Products Company, but continued to transact the same line of business. He also claims to have revised his literature so as to eliminate the objectionable portions thereof. The merits of such claim will

be dealt with hereafter. Subsequently it came to the attention of the Postmaster General that appellant was continuing to operate a scheme to defraud, and after further citation to show cause, and an extended hearing, the Postmaster General on August 15, 1919, issued a further order to the postmaster at Chicago forbidding him to deliver letters or to pay postal money orders to the Organo Products Company, the name under which appellant was then doing business. (R. p. 7.) Appellant again applied for an injunction, but it was denied and his bill of complaint dismissed. (R. p. 282.) He thereupon perfected an appeal to the Circuit Court of Appeals, which court, in a carefully reasoned opinion, affirmed the judgment of the trial court. (R. p. 293 et seq.) The present appeal has been taken for the purpose of securing a further review by this court.

His contention before this court asserts that the "effectiveness" of the remedy, Organo Tablets, which he was selling to the public through the mails, was "a mere matter of opinion" and therefore could not form the basis of a charge of fraud, thus seeking to bring his case within the ruling of this court in *American School of Magnetic Healing* v. *McAnnulty* (187 U. S. 94). That the two cases may be distinguished can be readily demonstrated.

ARGUMENT.

I.

Appellant Claims for His Preparation Curative Properties Not Justified by Medical Opinion.

A careful examination of the booklet appearing at page 12 of the record, which appellant distributed to the public, presumably through the mails, leads inevitably to the conclusion that it was knowingly designed and intended to create in the minds of those who should read the booklet (1) that they were physically defective in some regard, (2) that appellant's remedy, viz, Organo Tablets, would cure them, and (3) that such remedy could not be elsewhere purchased.

On the front outside cover of the booklet, in letters so large that "he who runs may read" them, are the words, "Are you 100 % efficient? The present time requires energy and endurance." This is followed by statements in the next few pages calculated to impress the reader that if he is not "100% efficient" the real cause of his physical deficiency is sexual weakness, and Organo Tablets are what he needs. Then follow statements which are thoroughly calculated and intended to lead the reader to believe that these Organo Tablets are a certain cure. The following statements are typical:

> DO NOT LET FALSE PRIDE STOP YOU FROM BEING CURED.
>
> From this it will be seen that no man should hesitate to take the proper treatment for nerv-

ous weakness, sexual decline and its accompanying ailments for by so doing he is by no means admitting that he has anything to be ashamed of. If in a weakened condition, it is due to himself, whether married or single, that he put himself in good physical condition and we say, don't delay. Don't let false pride keep you from seeking a cure. Attend to it before it is too late.

ORGANO TABLETS SUPPLY MISSING ELEMENTS.

The timely use of Organo Tablets for a reasonable length of time seldom fails in invigorating the functions of the body, bringing about tissue repair, so that those parts that are weak are strengthened and restored to their normal condition.

What can be a more sensible form of health insurance, what a greater preventive of weakness, sickness, and disease, what a more rational remedy in the case of weaknesses peculiar to men, than the use of Organo Tablets.

ORGANO TABLETS A LOGICAL REMEDY.

Weakness and ill health may be due to many causes. A man may be reasonably certain that it is this or that function that is at fault. But never can we be absolutely certain, beyond all question of mistake, for no one is endowed with X-ray sight. We can not look into our bodies and see the organs work, therefore at times it is even difficult to apply the correct treatment, unless it be a logical remedy, such as Organo Tablets.

> Testicular Extract from which Organo Tablets are principally compounded is being recommended and prescribed by leading physicians throughout the civilized world for Nervous Weakness, General Debility, Sexual Decline or Weakened Manhood, Urinary Disorders, Lame Back, Lack of Ambition, Energy and Nerve Force, Sleeplessness, and Rundown System. We believe it is the greatest remedy and that it has no equal. It has proven itself safe, prompt, and satisfactory in hundreds of cases.
>
> If you are failing in any of the essentials of manhood, we can not urge you too strongly to give your case timely and immediate attention. Think of the comfort and happiness of coming years that result only from health and strength, and make up your mind to try with confidence Organo Tablets.
>
> Organo Tablets are a valuable treatment for restoring lost vitality, renewing cell life, and imparting vigor to the organs of man.
>
> In calling your attention to Organo Tablets we honestly believe we are offering you the very best method and remedy for regaining lost sexual power. (Circular, R. p. 13.)

That the booklet intended the reader should understand that Organo Tablets were made especially for appellant's company and could only be purchased from it is demonstrated by the following excerpts from the booklet:

> Organo Tablets are prepared, in accordance with our orders, in one of the largest and best laboratories in the country, which is in itself a

> guarantee of the preservation of this cell vitality.
>
> Organo Tablets are useful to replace these losses. Extracts from the Orchitic or testicular Glands, although not regularly on the market, have been used by physicians since 1896, and are a valuable and scientific treatment for nervous debility and kindred ailments of men.

The points above mentioned other than those relating to the curative properties of Organo Tablets, and the necessity of purchasing them from appellant's company, speak for themselves, and require no further discussion here.

1. The tablets are not a cure as claimed. To establish this fact the testimony of medical men competent to testify was secured by the Postmaster General. Out of their experience and investigation they united in the view that Organo Tablets, particularly when taken by the mouth, could not produce the results appellant claimed for them. Their testimony in full may be found at pages 66–183 and 263–271 of the record. There was also before the Postmaster General the following letter from Armour & Company, which is self-explanatory. It reads as follows (R. p. 280):

> Referring to the Packers Product Co., I can not find upon investigation that we have ever sold these people any goods. If they are handling anything manufactured by Armour & Company they are evidently buying from jobbers.

So far as the Orchic substance is concerned: This is a product that we manufacture for the medical profession and the drug trade. We do not advertise it, as careful search by medical men has failed to reveal any therapeutic value in the glandular substance.

It is barely possible that the Packers Product Co. is buying Orchic substance from some wholesale drug house. That doesn't give the concern any reason for making preposterous claims about the medicinal value of Orchis Aries Extract, nor does it give the concern the right to bamboozle the ignorant and credulous by the use of Armour & Company's name.

If this Packers Product Co. is controlled by the same man that has operated under other names, he finds that Armour & Company's name is worth more as an advertisement than anything else in his circulars, etc.

I think this Packers Product Co. is controlled by a man named Huebner, who has operated under the names of Smith & Parker and Green & Thomas, etc.

Not only so, but there was likewise before him a letter containing the following views of the American Medical Association Council on Pharmacy and Chemistry (R. p. 279):

In reply to your letter of June 2d I wish to inform you that it was the opinion of the Council that, although the testicle is an internal secretion of great importance, there is practically no evidence that the administration of any testicle preparation (Orchic Substance) has any beneficial effects in any condition.

> While at one time the Council described testicle (Orchic Substance) in New and Nonofficial Remedies on the basis that these preparations were in the experimental stage and that for this reason definite, reliable preparations should be made available to the medical profession, the Council decided in 1911 to omit testicle preparations from New and Nonofficial Remedies altogether. It is certainly entirely without warrant on the basis of available evidence to claim that any preparation of testicle (Orchic Substance) is a rejuvenator and restorer of lost manhood.

The above views are also confirmed by the medical evidence appearing at pages 274 et seq.

The contra medical evidence offered by appellant not only fails to justify his broad positive claims, but actually demonstrates that the use of orchic substance, an ingredient of appellant's tablets, is not only wholly experimental, but that its administration is controlled by the condition of the individual patient to be determined by a careful and competent physician. Stated differently, such evidence is opposed to a stock formula which could be safely taken by a layman upon his own diagnosis of his physical condition.

Nor are the numerous testimonial letters of users of appellant's remedy of any real value in establishing his good faith. Such letters are of the type usually employed to exploit various questionable remedies. These letters not only fail to show any actual cure, but most of them leave the reader in ignorance as

to the complaint for which the remedy was taken. Certainly they do not tend to establish the truth of the extravagant claims contained in appellant's booklet.

Thus with the weight of medical testimony against the curative properties of orchic substance, the chief ingredient of appellant's tablets, how could he, a layman, form a good faith belief to the extent set forth in his booklet through which he urged the public to purchase and use his remedy as a cure. In other words, the medical views are such that he could not honestly make the statements the public was asked to accept as truths.

The following excerpt from *Samuels* v. *United States* (232 Fed. 536, 544) is apposite:

> One of the important questions in issue was what the defendant knew to be the true facts, and not what others believed. If he knew that the medicine was not a cure for the many ailments claimed for it, and in fact for none, the fact that many of those who used it believed that it had cured them would be no defense, no more than the defendant could have been found guilty because some of those who had used his medicine did not obtain the relief expected from it if, as a reasonable man, he honestly believed or had reasonable cause to believe that it possessed the curative properties he claimed for it.

Moreover, appellant's tablets were purchased by him from Parke, Davis & Company, and were of the same formula of a preparation which the firm

itself sold to the trade. (R. p. 150, 187.) The firm, in its advertisement, has merely this to say of its preparation (R. p. 185):

> Indications: Neurasthenia, diabetes, hypertrophic prostatitis, impotence, hysteria, hystero-epilepsy, and as an aphrodisiac. Beneficial effects have been observed in eczema, psoriasis, and obesity.

There is plainly no claim of a cure here. That being so, how could appellant in the absence of well determined medical opinion in the use of these very tablets add so extensively, as he has done, to the claims of the manufacturer? Certainly he could not, in good faith, base such claims upon sporadic results obtained from the use of orchic substances in other forms, different dosages, and manner of administration.

2. The evidence likewise plainly discloses that appellant's preparation is not one of their own peculiar compounding and obtainable only from them, as their booklet leads its readers to believe. According to admissions of record, the same preparation may be obtained from Parke, Davis & Company and other drug manufacturers. (R. pp. 184, 185.)

3. Fraud in this case may therefore be said to rest upon (1) the positive claims regarding the curative properties of Organo Tablets, and (2) the plain attempt to foist off onto the public as their own peculiarly compounded preparation a substance which could be purchased elsewhere.

The attempt of appellant to press the alleged analogy between his case and that of *American School of Magnetic Healing* v. *McAnnulty* (187 U. S. 94) to the point of making the ruling in that case determinative of his must fail. A careful examination of the *McAnnulty case, supra*, discloses that it was determined on demurrer, and further, that the Government's admission of the truthfulness of the facts properly pleaded (see p. 103 of opinion) could result in only one view, viz, that the Postmaster General by his decision had merely set up his opinion against that of the appellant. Obviously, the mere opposing view of the Postmaster General did not establish fraud.

The case at bar is more thoroughly analogous to that of *Missouri Drug Company* v. *Wyman* (129 Fed. 623, 628), the following excerpt from which appears to have been approved by this court in *Seven Cases* v. *United States* (239 U. S. 510, 518):

> It must also be borne in mind that it is not always true that a misrepresentation, to amount to a fraud, must be a misrepresentation as respects some matter of fact, although such is the general rule. There are well-established exceptions to this rule. An opinion may sometimes be expressed under such circumstances as will render a person guilty of a fraud; as, where one who is an expert, or who possesses peculiar knowledge of the value or the quality of an article expresses to another, who lacks such special knowledge, and who relies upon the superior information

> of the person with whom he is dealing, an opinion as to the value or quality of the article which he does not honestly entertain, doing so for the purpose of deceiving him. Cooley on Torts (2d Ed.) p. 567, and cases there cited; Eaton on Equity, p. 291, and cases there cited. In view of this exception to the general rule, some of the statements which the complainant appears to have been in the habit of making with respect to the merits of its "Vitality Pills," treating them as expressions of opinion, might well be found to be false and fraudulent if they were not entertained by the complainant, but were made solely with a view of inducing the unwary to purchase its "Vitality Pills."

We contend that the above quotation peculiarly applies to the case at bar. Not only so, but the facts in that case concerned a remedy and method of advertising strikingly similar to those involved here.

II.

A Divided Medical Opinion Would Not Justify Appellant's Claims.

Assuming arguendo that medical opinion was fairly divided on the question of the curative value of the remedy marketed by appellant, we still insist his course is one of fraud. In such a case can a man ignorant of science and medicine, make a choice between such divided medical opinion by the flip of a coin or the throw of a dice and induce the public to purchase his preparation as a demonstrated cure? Yet that appears to be appellant's position. In that

situation whether the preparation be a cure or not, is decidedly problematical. How can a layman form an honest view upon the subject? If he presses the curative view upon the public for the purpose of inducing them to make purchases from him, and suppresses the opposing medical view which is peculiarly within his own knowledge and of which the public could not ordinarily be aware, does he not thereby invade the public's right to fair dealing and thus defraud it? *Wilson* v. *United States* (190 Fed. 427, 434). The utterance of half truths when the relations of the parties, or the subject matter demand a fuller disclosure, has a well-defined place in the domain of fraud. (12 R. C. L. par. 71, 310; *Tyler* v. *Savage*, 143 U. S. 79, 98.) As said by this court in *Seven Cases* v. *United States* (239 U. S. 510, 518), "persons who make or deal in substances, or compositions, alleged to be curative are in a position to have superior knowledge and may be held to good faith in their statements."

Nothing less than the weight of medical opinion favorable to a drug as a definite cure would authorize a person like appellant to so represent it to the public. That is certainly the basis upon which the public purchases, and where the division of medical opinion is different from that just stated, the public is entitled to have that fact revealed when it is asked to purchase the article as a definite cure. If this be not the true test, then a layman may commercialize an article as a cure if he can find one medical man who entertains such view of the article,

although the profession generally rejects such curative view, and further, notwithstanding the fact he is not in position to form any independent view upon the subject. Stated differently, he must believe that it is a cure, and to arrive at such belief he must have adequate medical support. With a fairly divided medical opinion it would be impossible for a layman to entertain such belief. His opinion, if honestly expressed, would necessarily be one of doubt. To no other conclusion can one come after carefully reading the record in the case at bar. Had appellant in his literature revealed the true situation with respect to medical opinion upon his alleged cure, is it conceivable that his sales would have been as numerous as under the literature which he actually used? Obviously not. Does not this fairly demonstrate the real fraud and deception which he practiced? As so well said in *Edwards* v. *United States* (249 Fed. 686, 689):

> * * * but we think there was no purpose to hold that there must necessarily be an intent to get another's money without giving value for it; an intent to get it by misleading the owner in any particular that affects his completely intelligent consent may be sufficient. See Bettman *v.* U. S. (C. C. A. 6), 224 Fed. 819, 140 C. C. A. 265.

May it not also be properly urged that whether the public would be willing to pay the price charged would depend essentially upon whether the curative claims were based upon a well-defined weight of medical opinion or merely upon a division of such

opinion. In parting with its money the public is certainly entitled to know the true basis upon which it is acting. *Menefee* v. *United States* (236 Fed. 826, 831).

III.

In Case at Bar Appellant Assumes Burden of Establishing that the Decision of the Postmaster General Here Drawn in Issue is "Palpably Wrong."

It seems proper at this point to consider briefly the burden resting upon appellant not merely to establish doubt as to the correctness of the decision of the Postmaster General but to demonstrate that his decision is "palpably wrong."

In *Public Clearing House* v. *Coyne* (194 U. S. 497), in which this court reviewed the decision of the Postmaster General under the same statute he acted in the case at bar, the rule was laid down that the courts might act if he "exceeded his authority or his action is palpably wrong."

And in *Smith* v. *Hitchcock* (226 U. S. 53, 58) this court said:

> * * * we should not interfere with the decision of the Postmaster General unless clearly of opinion that it was wrong.

We believe a careful review of the record will lead this court to say, as it did in the Smith case, just cited, "We have no such clear opinion."

IV.

CONCLUSION.

Briefly stated the picture presented by the record is as follows, viz, appellant's sale of the remedy

here involved under the name of the Packers Product Company was found to be fraudulent, which view was upheld by the United States Court to which he applied for relief, and its opinion in that case aptly fits the case at bar. (R. p. 22.) The same business conducted by appellant under the name of the Organo Products Company and promoted by a booklet (R. p. 12), which makes substantially the same curative claims as those contained in the previous booklet (R. p. 250), was also found to be fraudulent by the Postmaster General and his views upheld by the United States District Court and the Circuit Court of Appeals. Thus we have the Postmaster General on two different occasions, two separate trial courts, and one appellate court uniting in the finding of fraud. In addition to that the record discloses appellant's previous course of fraud in the promotion of devices intended to appeal to the sexual, which record must necessarily have an enlightening bearing upon his intent in the case at bar. Confronted by this weight of testimony can it be confidently urged that appellant has demonstrated that the finding of the Postmaster General was "palpably wrong"? We think not, and therefore respectfully urge that the judgment below be affirmed.

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DECEMBER, 1921.

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